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Report of the Intergovernmental Group of Experts on Restrictive Business Practices on its tenth session

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REPORT OF THE INTERGOVERNMENTAL GROUP OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES ON ITS TENTH SESSION

Held at the Palais des Nations, Geneva,
from 21 to 25 October 1991

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INTRODUCTION

1. The Intergovernmental Group of Experts on Restrictive Business Practices held its tenth session at the Palais des Nations, Geneva, from 21 to 25 October 1991.

2. In the course of its session, the Group held 6 plenary meetings and 7 informal meetings.

Opening statements

3. The Deputy Secretary-General of UNCTAD said that the task of the Group at its present session was to review the implementation of the resolution adopted at the Second United Nations Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (resolution entitled "Strengthening the Implementation of the Set"), as well as to pursue the work begun at its previous sessions. Regarding the latter, the secretariat had now submitted in its completed form the study on concentration of market power (TD/B/RBP/80), and delegations' comments would be taken into account in finalizing that study, as well as the report on the model law (TD/B/RBP/81). The Manual on RBP Legislation (TD/B/RBP/82) had also been further revised.

4. The Second Review Conference had decided that the Set should be strengthened through the adoption and effective implementation of national legislation on RBPs. Three main areas of action had been identified, namely information, consultations and technical assistance. The exchange of information on RBPs would be made directly between States or through UNCTAD.

5. The secretariat had prepared a note (TD/B/RBP/78) containing a directory of addresses of authorities in charge of RBP control, an indicative check-list of items for guidance in the preparation of requests for information and a checklist of possible steps to follow in the preparation of requests for consultation. The Group's present session provided an opportunity for States to engage in consultations, be they private or public, bilateral or multilateral. Consultations would also take place as requested by Group B in the note reproduced in document TD/B/RBP/84.

6. Technical assistance activities, described in document TD/B/RBP/83, had significantly increased in the last two years and were bound to increase in the coming year. The main reason for such an increase was without doubt the recognition by an ever-increasing number of States - developed, developing and Eastern European countries - of the importance of competition in the development process. Most countries embarking on economic reforms and giving greater say to enterprises or to private initiative were becoming aware of the importance of providing a legal framework which would allow such enterprises to operate in competitive markets, free from the danger of being stifled by RBPs applied by existing monopolies or dominant enterprises to the detriment of the overall development interest of the economy.

7. He expressed appreciation to all those countries that had contributed to UNCTAD's technical assistance efforts on RBPs. However, the available resources were far from sufficient, and he appealed to Governments to increase their aid so that technical assistance activites could continue under the best possible conditions.

8. The adoption of national legislation on RBPs and to the extent possible of harmonized laws, especially if accomplished in conformity with the Set, constituted an extremely important step forward. However, there were more and more instances where national legislation would be inadequate to deal with certain RBPs which hampered international trade and which could be eliminated only through joint action by States. This was particularly true given the growing role of information flows, links within and among enterprises, and the new strategies and organizational structures resulting from the globalization of markets and production activities. In the absence of greater international cooperation, States - and consequently national laws - would be increasingly incapable of dealing effectively with competition problems arising from such global markets. It might therefore be necessary to begin consideration of the issue of making competition policy part and parcel of the international trading system. The Group, at its present session, might wish to formulate recommendations to that effect which could be taken up further at UNCTAD VIII.

9. The spokesman for the Group of 77 (Philippines) said that the positive outcome of the Second Review Conference was just a first step towards the strengthening of the Set of Principles and Rules. In that connection, there were a number of principles which should continue to be of fundamental importance in the work of the Intergovernmental Group. First and foremost, it was encumbent upon all States to take effective remedial or preventive measures against the use of RBPs which adversely affected the trade and development of developing countries. Second, it was important to ensure that RBPs did not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries.

10. There were also a number of issues which should constitute the foundation of the building process for the present and future work of the Intergovernmental Group. Firstly, the Set in its present form was insufficient for controlling restrictive business practices, particularly at the international level. Without prejudging the outcome of the the Uruguay Round, the Group of 77 believed that the next task in the whole process of building an equitable international trading system ought to be the launching of negotiations on a "General Agreement on Competition" containing obligations accepted by all countries. The Group of 77 believed that these matters should be seriously considered at UNCTAD VIII.

11. The second issue concerned the carrying out and dissemination of studies and research on RBPs. His Group welcomed the completion of the useful study on concentration of market power (TD/B/RBP/80), but that was the last study commissioned by the Intergovernmental Group. The UNCTAD secretariat had

previously proposed further studies to be undertaken, but the Group had been hesitant to undertake studies relating to, in particular, the relationship between RBPs and international trade policy. However, the fundamental changes that had taken place and continued to take place in the world economy today, specifically in the area of competition policy, justified undertaking studies in this area.

12. In accordance with their commitment to the Set of Principles and Rules, the States members of the Group of 77 recognized that one of the important means of effectively controlling restrictive business practices was through the adoption and effective enforcement of national restrictive business practices legislation. To this end, some States had adopted legislation and others were in the process of doing so. These countries were thus doing exactly what Group B countries were calling for. What was missing now was the necessary financial and technical assistance from Group B countries. In this connection, the Group of 77 wished to thank the Governments of the Netherlands and Norway for their contributions to UNCTAD's Trust Fund on Restrictive Business Practices. Thanks were also due to Germany for its valuable contribution in this area. He hoped that other countries, in particular the developed countries, would make financial and other contributions as soon as possible. UNDP had at last made a contribution which had made it possible to hold a symposium on Corporate Policies and Competition for Development in Seoul, Republic of Korea, and he hoped that this was the beginning of a relationship of cooperation and assistance.

13. The need to ensure transparency and the definition of consultation procedures in line with the Final Act of UNCTAD VII was another area to be built on at the Group's current session. Equally, the issue of States' needs for information on RBPs, as recognized in the resolution adopted by the Second Review Conference, should be further developed and effectively tackled. While welcoming the note of the UNCTAD secretariat containing proposals for a checklist for information, a checklist for consultations, and a directory of addresses of RBP control authorities (TD/B/RBP/78), he requested the UNCTAD secretariat to complete the work in this area, taking into account the views expressed during the session on these proposals.

14. In conclusion, he said that the Intergovernmental Group had come a long way from earlier sessions of confrontation and frustration to what one regional group called a "delicate balance" of compromise and goodwill all round. This spirit should henceforth be the norm in the work of the Intergovernmental Group.

15. The spokesman for Group B (United Kingdom) stated that, since the Group's last regular session in 1989, there had been far-reaching changes in the world, especially in Central and Eastern Europe, but also in several developing countries. Countries which had formerly espoused command economies were now moving towards free market economies, involving fundamental economic reforms. Competition laws and their effective enforcement were rightly seen by these countries as an essential component of the reform process. The Intergovernmental Group should advise and assist in this task by exchanging

ideas and information and engaging in consultations on the real problems of devising and implementing appropriate national and regional competition policies.

16. Group B countries looked forward in particular at this session to sharing their experience with all countries at the consultations scheduled on two important issues in competition law enforcement - the detection and control of cartels, and methods of enforcing competition laws with the appropriate sanctions to be applied. In this connection, some thought should be given to changing the previous format of the Group's sessions, allowing more time for additional discussions between experts on competition issues. His Group had always considered technical exchanges to be the main objective of the Intergovernmental Group.

17. Group B welcomed the documents prepared by the secretariat, particularly the revised draft of possible elements for a model law or laws on RBPs and the further work on the Handbook. His Group would be making suggestions during the session to improve the model law or laws.

18. Concerning technical assistance, advisory and training programmes, he noted with satisfaction the number and variety of activities undertaken by the secretariat, many of them with the participation of and voluntary contributions from Group B countries. His Group felt that, with the increasing number of requests for technical assistance, there was clearly a need for greater coordination between individual countries and international organizations such as UNCTAD and OECD to ensure that the limited resources available were used most effectively. There was also a need to devise a method for evaluating the results of technical assistance programmes and to lay down priorities to ensure that the maximum benefit was derived from them.

19. Concerning the checklists for requests for information and for consultations, as well as the list of addresses of competition authorities which the secretariat had prepared (TD/B/RBP/78), while the list of addresses was a useful working document, the checklists might discourage rather than encourage exchanges and consultations between countries because of their length.

20. The report on concentration of market power (TD/B/RBP/80) contained much useful information on merger trends, motivations and effects, but more work needed to be done on the various policy and procedural issues. His Group would be making further comments on the general scope of the report.

21. Finally, it was hoped that the tenth session of the Intergovernmental Group would be as constructive as the Review Conference had been.

22. The representative of China said that the Set of Principles and Rules had played a positive role in promoting national legislation on RBPs and in raising the awareness of enterprises with regard to fair competition. However, the objectives of the Set had not been fully attained. Although the

Set had been the subject of two comprehensive reviews, there still remained many ambiguities in wording and in the scope of control, and that was one of the causes for the delay in its effective implementation.

23. More seriously, RBPs had now developed into a substitute for trade protectionism. The developed countries in particular used RBPs to impose discriminatory treatment on the developing countries, and even to bar them from fair competition. This had greatly depressed the exports of the developing countries, and had had a serious negative impact on their economic development.

24. Since the developing countries were faced with technical and financial difficulties in drawing up RBP legislation and in establishing relevant enforcement mechanisms, providing them with necessary technical assistance was essential. This had been emphasized at the Second Review Conference. The UNCTAD secretariat and some donor countries had made a great contribution in this respect, and several national and regional symposia and seminars on RBPs had been held for the benefit of the developing countries. China had taken part in one of the regional seminars, for which he expressed his Government's gratitude.

25. He commended the secretariat for its studies and reports. With reference to the Handbook on RBPs, he hoped that there would be greater diversity in future work so as to reflect the differences in the legislation of countries at different levels of development. With regard to his country's legislation, the Law on Authorship had gone into effect on 1 June 1991, and some of the legislation under preparation in China, such as the Enforcement Regulation for the Law of Copyright and the draft amendment to the patent law, as well as some existing laws, such as the Regulations concerning the Protection of Computer Software, included the concept of control over RBPs. His country had also adopted administrative decrees and regulations against such RBPs as sale of unwanted goods by "tied purchasing", collusive pricing and counterfeiting, where conditions were considered as yet unripe for legislation. In the meantime, work on the preparation of a Foreign Trade Law and a Law Against Unfair Competition was progressing with vigour, though such work was constrained by lack of experience and expertise and the limited budget. His country was eager to benefit from the experience of other countries, and he also hoped that, in the near future, his country would receive assistance and support from the UNCTAD secretariat, relevant international agencies and friendly countries.

26. The representative of India said that RBPs and competition policies should be considered within the context of international trade liberalization and expansion. Many developing countries such as India had substantially liberalized their trade and foreign investment policies, deregulated economic sectors and reformed their competition legislation to take into account new industrial and trade requirements. However, these reforms had made developing countries more vulnerable to RBPs, and developing countries expected complementary action by the international community, particularly their development partners.

27. To realize the fruits of their policies, and to meet their costs, developing countries needed substantially improved and preferential access both to developed country markets and to the tools of competitiveness such as technology, distribution and marketing networks, and producer services. The control of RBPs and an equitable international competition policy were necessary to achieve both of these.

28. The reduction of governmental barriers to trade could follow from the Uruguay Round and from UNCTAD VIII, but something also had to be done about non-governmental barriers, which included RBPs, hence the Group of 77 proposal for a "General Agreement on Competition". The Conference should commence an exercise addressing RBP-related factors across the fields of international trade, resources for development, technology, commodities and services. Given the current consensus in the North-South dialogue with regard to the importance of the efficient functioning of markets, non-confrontational discussions and joint action on RBPs should be possible. The work of the Review Conference relating to transparency and to consultation procedures should also be followed up, and further technical assistance should be provided to assist in the adoption of competition laws and their enforcement against RBPs affecting developing countries' trade.

Chapter I

REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(Agenda item 3)

29. For its consideration of this item, the Intergovernmental Group of Experts had before it the following documentation:

> "Replies by States and regional groupings on steps taken to meet their commitment to the Set of Principles and Rules: note by the UNCTAD secretariat" (TD/B/RBP/79)

30. The spokesman for the Group of 77 (Philippines) said that his Group counted, in particular, on developed countries to take measures to detect and take appropriate remedial or preventive measures against RBPs adversely affecting international trade, particularly the trade and development of developing countries. Developing countries lacked expertise, experience and resources to effectively control restrictive business practices, particularly those originating in enterprises of developed countries, and thus must by necessity seek the cooperation and assistance of developed countries. For their part, developing countries were adopting legislation to control RBPs, but effective enforcement of such legislation was still in its infancy and hence the need for assistance from developed countries in this field.

31. The representative of Romania said that RBPs, especially those of transnational corporations, continued to exist and to affect international trade, particularly that of developing countries which were less prepared to cope with such a situation.

32. In his country, the ongoing process of reform based on transition to a market economy had involved, from the very beginning, the adoption of concrete measures ensuring full autonomy and free competition among economic operators, price liberalization and development of the private sector in the economy and services. In the field of privatization, two basic laws had been adopted, namely Law No. 18/1991 on land ownership, adopted in February 1991, which would make about 80 per cent of the country's agricultural land private, and Law No. 58/1991, adopted in August 1991, on the privatization of commercial companies organized as stock companies. All these measures and reforms were enlarging the coverage and application of the Set in Romania.

33. Although Romania did not yet have specific legislation on RBPs, the laws adopted up to now to introduce the economic and financial reforms incorporated the main rules and provisions of the Set. In this respect, he referred to Law No. 15/1990 on the reorganization of State enterprises as "régies autonomes" and commercial companies. Chapter V of this law, called "Association and free competition", forbade acts and measures specifically defined in the Set under Section D, articles 3 and 4. Other measures were included in Law No.11/1991 against unfair competition.

34. However, under the new market environment, his Government was concerned to work out and adopt specific legislation on anti-monopoly and anti-dumping practices, on subsidies and compensation measures and on government procurements, in order to protect and ensure fair competition. To this end, Romania would be interested in receiving UNCTAD's specialized assistance, with a view to having its draft legislation in this field reviewed by experts before enactment.

35. The representative of Sri Lanka said that his Government had taken some meaningful steps to strengthen the country's market economy. The concept of international competition had been brought into the industrial sector, and with 1992 having been declared the year of exports, every effort was being made to encourage foreign investments for rapid economic growth. A large number of state-owned corporations had been privatized. The Industrial Promotion Act No. 46 of 1990 had been introduced with effect from 1 January 1991. Under the provisions of this Act, Sections 18 and 26 of the Fair Trading Commission Act No. 01 of 1987 had been repealed, and as a result no price supervision would be carried out by the Commission, except for bread, flour and pharmaceuticals, which were still under price control. Prices of all other products and services would be determined by market forces.

36. Under the present provisions of the Act, proposed mergers could be investigated by the Commission on the basis of requests made to the Commission. Amendments to the relevant Sections of the Act had been accepted in principle, under which prior notification of all mergers would have to be made to the Commission. Thereafter, if no reply was received from the Commission within 14 working days, it would be presumed that there was no objection to the proposed merger.

37. The representative of the Union of Soviet Socialist Republics said that UNCTAD's work on RBPs was of great practical significance for his country at a time when the latter was moving towards a market system and introducing reforms in respect of types of ownership, monetary policy, anti-monopoly policy and promotion of competition. The Set of Principles and Rules should give impetus to international efforts to control RBPs, contribute towards the drafting of national RBP legislation and enhance competition. The increase in the number of countries adopting RBP legislation was a welcome development for the implementation of the Set, and UNCTAD activities in respect of RBPs in international trade should be encouraged. In that connection, on 20 February 1991 the USSR Cabinet of Ministers had adopted a decision on control of RBPs affecting foreign trade.

38. Within the context of its economic reforms, his country had enacted several pieces of anti-monopoly legislation at both the all-Union and the republic level. The laws on "General Principles of Entrepreneurship in the USSR" and "Principles of Civil Legislation of the USSR and the Republics" guaranteed the rights of entrepreneurs and created the conditions for free and fair competition. The law of the RSFSR "On competition and limitation of monopolistic activity on merchandise markets" inter alia prohibited economic agents in a dominant market position from taking actions harmful to other economic agents, and actions by public authorities and administrations which

restricted competition were also covered, the responsible body being the Anti-Monopoly Committee of the RSFSR. The USSR law on "Limitation of monopolistic activity in the USSR" inter alia prohibited any kind of agreement among competitors which reduced competition, with responsibility for State monitoring monopolistic activities entrusted to the Anti-Monopoly Committee of the USSR. Finally, the Treaty of Economic Association of 18 October 1991 also dealt with the issue of elimination of RBPs.

39. The representative of Bulgaria said that the comprehensive reforms being undertaken in Bulgaria to establish an open market economy had included privatization of small firms, while larger firms were to be privatized in the near future. The legal framework for such changes included the Law on Foreign Investments, the Trade Bill, the Bill on Land Reform, and the Law on the Protection of Competition. The latter law was consistent with, and contained provisions directly linked to, the Set of Principles and Rules. It aimed at promoting and protecting competition, free enterprise and consumer welfare through the control and elimination of RBPs among enterprises aiming at the acquisition and/or abuse of a dominant position, including, inter alia, through vertical and horizontal arrangements, mergers and unfair competition. The law was administered by the Commission for the Protection of Competition, and strict sanctions were provided for against its violation. The participation of Bulgarian experts in previous meetings of the Intergovernmental Group, as well as UNCTAD documentation, had greatly assisted in the preparation of the law. It was hoped that the enforcement of the law would contribute to the development of fair national and international competition.

40. The representative of Kenya noted that his country, as the first African country to legislate on competition, felt it was its duty to share some of its experiences in administering and enforcing its legislation. First, there existed a conflict between development goals and the need to enforce competition law. One aspect of that conflict concerned the letters of no objection demanded by some TNCs before investing in developing countries. This, of course, limited access to markets and restrained competition by practically excluding any other prospective investors and competitors.

41. Further, prosecution of RBP offenders had been hampered by threats of relocation by firms suspected of engaging in RBPs. In addition, government participation in commerce and industry through State enterprises caused difficulties in controlling RBPs applied by them in exercise of their exemption under Section 5 of the competition law. Such exemptions were considered unfair and discriminatory by the private sector. However, the Government's continuing privatization programmes should in due course correct that anomaly.

Chapter II

ACTIVITIES RELATING TO THE SPECIFIC PROVISIONS OF THE SET

(Agenda item 4)

42. For its consideration of this item, the Intergovernmental Group of Experts had before it the following documentation:

"Concentration of market power, through mergers, take-overs, joint ventures and other acquisitions of control and its effects on international markets, in particular the markets of developing countries: report by the UNCTAD secretariat" (TD/B/RBP/80) (agenda item 4(a));

"Information and consultations procedures on restrictive business practices: note by the UNCTAD secretariat" (TD/B/RBP/78) (agenda item 4(b));

"Information and consultations on restrictive business practices: communication received from OECD" (TD/B/RBP/84) (agenda item 4(b));

"Revised draft of possible elements for articles of a model law or laws and commentaries on the elements: prepared by the UNCTAD secretariat" (TD/B/RBP/81) (agenda item 4(c));

"Handbook on Restrictive Business Practices Legislation: note by the UNCTAD secretariat" (TD/B/RBP/82) (agenda item 4(c));

"Review of technical assistance activities: note by the UNCTAD secretariat" (TD/B/RBP/83) (agenda item 4(d)).

43. The spokesman for the Group of 77 (Philippines), said that the structural adjustment reforms adopted by many developing countries had substantially liberalized, privatized and opened up their economies. At the international level, markets had become both more globalized and liberalized, although this process was being impeded and hampered by tariff and non-tariff barriers to trade, as well as by RBPs. It was therefore essential that Governments safeguard the workings of the market by adopting and enforcing rules relating to competition and RBPs which: (a) maintained structurally competitive markets; (b) prevented collusion among market generators; and (c) prevented abuse of market power.

44. The study on the concentration of market power was directly concerned with the first of these objectives and indirectly with the third. The study rightly emphasized the need for vigilance in this context, since competitive conditions in the domestic markets of developing countries were imperfect, the export markets of developing countries were subject to a variety of entry barriers, including RBPs, high concentration existed among trading intermediaries in the import channels of some developing countries (particularly in some areas), and some exports from developed countries were

controlled by joint ventures or cartels. As the study pointed out, mergers and joint ventures in developed countries, even where they did not have anti-competitive effects in the home countries of the firms involved, did affect developing country markets because of restrictions on the freedom of affiliated firms to compete, and because they increased the possibilities for collusion and international cartelization in a range of industries. The Group of 77 therefore called for the full implementation of all provisions of the RBP Set, in order to ensure its effective application to arrangements affecting international trade. The Group of 77 also called for improved transparency, information sharing, consultations and cooperation among Governments of developing and developed countries in this area.

45. Of course, the developing countries had to make the necessary efforts to help themselves by adopting, applying and updating competition and merger control laws. Such reforms were indeed part of strengthening good management in developing countries. However, it was no easy task to undertake case-by-case evaluations of individual arrangements, or to ensure the consistency of policies affecting competition and acquisitions of control. The Group of 77 therefore called upon developed countries to assist them in their endeavours.

46. With regard to information and consultations, he stressed the need to ensure transparency and the definition of consultation procedures in line with the Final Act of UNCTAD VII. Equally, the issue of States' needs for information on RBPs, as recognized in the resolution adopted by the Second Review Conference, should be further developed and effectively tackled. The Group of 77, while welcoming the note of the UNCTAD secretariat containing proposals for a checklist for information, a checklist for consultations, and a directory of addresses of RBP control authorities (TD/B/RBP/78), thought it important for the UNCTAD secretariat to complete its work in this area.

47. The model law and the Handbook on RBP legislation had become vital tools, in particular for developing countries adopting legislation to control RBPs. The UNCTAD secretariat ought to continue revising the model law, as called for in paragraph F.5 of the Set of Principles and Rules, taking into account recent trends in RBPs control. Similarly, the compilation of the Handbook on RBP Legislation should include legislation from a variety of source materials.

48. Technical assistance, advisory and training programmes for developing countries were the linchpin of effective control of RBPs. The Group of 77 had high hopes that States, in particular developed countries, as provided in section F, paragraph 7, of the Set of Principles and Rules, would translate their commitment made at the Second Review Conference into concrete action without the qualification "subject to availability of resources". The Group of 77 also appealed to UNDP to continue making financial contributions to the RBP Trust Fund. He urged other international organizations and financing programmes to provide resources, as called for in section F.7 of the Set.

49. The spokesman for Group B (United Kingdom) said that many of the documents for the session had arrived late in capitals, and some had not been

made available in time in the appropriate language. It was impossible in these circumstances for the States concerned to give a considered view on complex issues. In future, reports, and in particular studies relating to the Set, should be sent out in all working languages well in advance of sessions.

50. Concerning the study on the concentration of market power (TD/B/RBP/80), the report contained much useful information, but countries should be allowed more time to submit written comments for the secretariat to take into account in its further work on the study. Group B therefore took the preliminary view that a further revision of the study should be undertaken by the secretariat on the basis of the comments made at the Group's tenth session and those submitted by the end of January 1992.

51. Concerning the paper on information and consultation procedures on RBPs (TD/B/RBP/78), the checklists for requests for information and consultations should and must be considered a purely voluntary guideline for countries requesting information and consultations. It should not be thought that such information must always be sought by requesting countries, or that it was always possible for the country requested to provide the desired information. In the first place, reasons of confidentiality might prevent or restrict the disclosure or transmission of certain information. Secondly, several Member countries of Group B had adoped so-called "blocking" statutes which were designed to prevent the transmission of particular types of information requested from other countries under a competition investigation or proceeding. It might thus be illegal for national competition authorities to comply with certain requests. This point had been emphasized in paragraph 3 (1) of the resolution adopted by the Second Review Conference. In addition, when information was sought under the checklist concerning proposed new legislation which might affect the interests of other countries, it should be up to the requesting country and not the requested country to specify in what way it thought particular legislation might adversely affect its interests.

52. Concerning the annex to document TD/B/RBP/78, Group B welcomed the list of addresses of competition enforcement authorities, but recommended that the secretariat also include the names of the competent officials as well as telephone and telefax numbers in a revised update of the list. This would facilitate contacts and exchanges considerably.

53. Concerning the model law for the control of RBPs, he reiterated Group B's interest in the continuation of this work. Again, individual Members of Group B would like more time to study the elements in greater detail and would recommend that the secretariat invite comments up to the end of January 1992. At this stage, he would make two general comments on behalf of Group B. The first was that the elements in the current version included an economic development test for the assessment of RBPs and did not rely only on a competition test. He had in mind in particular the end of article 1 and article 4 I (ii). His Group's view was that a competition test should be the main focus of a competition law. Secondly, there were several features of the model law which appeared to impose considerable regulatory burdens on enterprises in terms of making notifications and seeking approvals or exemptions. He had in mind particularly article 6.

54. With regard to technical assistance, firstly it would be useful if Member States supplied the secretariat with details of their bilateral technical assistance efforts in order to complete the picture of the considerable amount of assistance being undertaken. In addition, the secretariat was urged to consider working with other international organizations such as OECD and the World Bank to ensure effective use of resources. In connection with bilateral assistance, the secretariat could perhaps make a specific mention in the annual request to countries for information on developments under the Set to enable countries to provide details of their individual activities or their joint activities with other countries which had not been channelled through the secretariat.

55. Secondly, it was important for the development of technical assistance programmes for an evaluation to be made of the relative merits and disadvantages of the different types of assistance. It was suggested that the secretariat ask both donor and recipient countries how effective a particular seminar or workshop had been and adapt future projects accordingly. This was a matter which could usefully be explored in the Group's consultations.

56. The representative of Romania welcomed the study on market power and said that he was in favour of the secretariat preparing further studies on RBPs on such topics as means of control of RBPs and the role of competition in the industrialization and economic growth of developing countries, or on sectoral questions such as RBPs in the food industry.

57. He also expressed appreciation for the other secretariat documents which had been prepared for the Group's session and which were of great help to his country in drafting legislation in the field of RBPs.

58. With regard to technical assistance, he felt that UNCTAD should further enlarge and develop its technical assistance activities, consultative services and training of personnel in the field of RBPs in order to support the developing countries and those countries in transition to a market economy in working out and putting into operation their national RBP legislation.

59. The representative of Sri Lanka, referring to agenda item 4 (d), said that, further to the resolution adopted at the Second Review Conference, the German Foundation for International Development (DSE), with the financial support of the German Government together with experts from the Ministry of Economics, the Federal Cartel Office and UNCTAD, had arranged a regional seminar in Bangkok for officials of restrictive business practices authorities in India, Sri Lanka and Thailand. His Government was deeply appreciative of that assistance. His country had also benefited from the Symposium organized by UNCTAD in cooperation with the Korean Development Institute (KDI). Similarly, his country had participated in the Fourth Conference on Anti-trust Policies held in Wellington in 1991, together with other representatives from Asian and Oceanian countries. He requested the UNCTAD secretariat to organize a seminar in Colombo for the benefit of the representatives of the business sector, as well as other government and corporation officials in Sri Lanka.

60. The representative of the Union of Soviet Socialist Republics, referring to information and consultations on RBPs, said that multilateral exchanges of

information within UNCTAD should be promoted as the basis for higher forms of international cooperation, including intergovernmental consultations. Country registers on RBPs affecting international trade should be established or made accessible. There should also be a clear system of bilateral cooperation within the UNCTAD framework. Consultations should serve as the basis for coordinated action by competent State RBP control bodies, they should place all parties on an equal footing, and they should not turn into international arbitrational investigations. The publication of regularly updated lists of national RBP control authorities by UNCTAD was welcome.

61. With regard to technical assistance in the field of RBPs, the relevant UNCTAD activities should be expanded, and his country would be interested in such technical assistance, advisory and training programmes within the context of its economic reform programme. Assistance should be extended to all interested countries, and UNCTAD should in particular organize more RBP seminars and symposiums.

62. The revised draft of a model law on RBPs represented an important step forward in developing a model law and unifying RBP legislation. His country had regularly supplied the UNCTAD secretariat with information on its national legislation in the field of RBPs. Finally, his country supported the work on the Handbook on RBP legislation, and all groups of countries should help by supplying available information. However, the financial possibilities must be looked at carefully.

63. The representative of Zambia said that his Government, as part of its policy of opening up the economy to market forces, aimed to ensure free and fair competition. It had therefore requested technical assistance from UNCTAD, which had organized a national seminar in Lusaka in March 1991. The seminar had, inter alia, concluded that price liberalization should be accompanied by the promotion of competition, and that national policies on investment, industrialization, trade and tariffs should support competition policy. However, while imports and privatization would support competition or foreign investment, the dumping of cheap imports and the replacement of public by private monopolies should be avoided, and the role of private firms in serving the remaining public enterprises should be encouraged. The seminar had thus recommended that the Government consider enacting and effectively enforcing RBP legislation to encourage competition and to protect consumers. Help was required for this purpose from relevant international organizations such as UNCTAD. The Zambian Prices and Income Commission, in cooperation with other competent institutions, was implementing the resolutions adopted by the seminar in respect of appropriate legislative and administrative machinery, which would be supported by UNCTAD experts.

64. The representative of Kenya said that, due to the complexity of the administration and enforcement of competition legislation, it was important to have trained and experienced personnel. In that connection, he thanked the UNCTAD secretariat for its technical assistance and requested Governments to continue contributing to those programmes. He also thanked Governments that had assisted in training Kenya's RBP officials through seminars and direct attachments. Training through direct attachment to experienced competition authorities had been of the greatest benefit.

65. For its part, given some financial assistance, Kenya was willing to share its short experience with other developing countries that had no legislation on the subject, either directly or through the UNCTAD secretariat.

66. The adoption of the Set reflected the seriousness with which the international community viewed competition. Information and consultations were necessary for its administration and enforcement.

67. Finally, his delegation joined other delegations in requesting that UNCTAD undertook a study on the relationship of RBPs control with industrialization policies and regional integration.

Chapter III

WORK PROGRAMME ON RESTRICTIVE BUSINESS PRACTICES

(Agenda item 5)

68. The spokesman for the Group of 77 (Philippines) said that the fundamental changes taking place in the world economy, specifically in the area of competition policy, justified undertaking studies in this area. The Group of 77 therefore welcomed the studies proposed by the UNCTAD secretariat, especially the "Study on restrictive business practices adversely affecting international trade, particularly the trade and development of developing countries, dealing with ways and means for States to control such practices, in particular when they originate from abroad and have adverse effects on countries' domestic markets and on their exports". He also welcomed the proposal to study the "Relationship of restrictive business practices control with industrialization". He could not think of a more appropriate time for such studies in view of the present trend in almost all countries - developed and developing - towards deregulation, privatization and, generally, the liberalization of domestic markets. Needless to say, such structural adjustment programmes imposed a heavy burden on developing countries.

69. The spokesman for Group B (United Kingdom) said that the secretariat proposal for a "Study on restrictive business practices adversely affecting international trade, particularly the trade and development of developing countries, dealing with ways and means for States to control such practices, in particular when they originate from abroad and have adverse effects on countries' domestic markets and on their exports" was not within the scope of the provisions of the Set and thus exceeded the mandate of the Intergovernmental Group. Group B also did not think that any good arguments had been advanced for undertaking a study of RBPs in the food industry. As regards the study on the relationship of RBP control with industrialization policies and regional integration in developed and developing countries, Group B considered that appropriate aspects of this study could be undertaken in the future. At the moment, however, resources should be devoted to completing the work on hand.

70. His Group had taken note of the proposal made by the spokesman for the Group of 77 for UNCTAD VIII to consider beginning negotiations on a general international agreement on competition. However, it would be inappropriate for the Intergovernmental Group to make proposals to UNCTAD VIII, particularly when there had just been a Review Conference which had not made any such proposals.

Chapter IV

CONSIDERATION OF TEXTS AND PROCEEDINGS OF CLOSING PLENARY

71. At the Intergovernmental Group's 5th plenary meeting, on 23 October 1991, the spokesman for Group B (United Kingdom) introduced draft agreed conclusions on agenda items 3, 4 and 5 (TD/B/RBP/L.54) on behalf of the States Members of Group B.

72. At the Intergovernmental Group's 6th (closing) plenary meeting, on 25 October 1991, the Chairman introduced draft agreed conclusions on agenda items 3, 4 and 5 (TD/B/RBP/L.57).

Action by the Intergovernmental Group of Experts

73. At the 6th (closing) plenary meeting, the Intergovernmental Group of Experts adopted draft agreed conclusions TD/B/RBP/L.57 (for the text of the agreed conclusions, see annex I).

74. Draft agreed conclusions TD/B/RBP/L.54 were then withdrawn.

Consultations

75. At the Intergovernmental Group's closing plenary meeting, the Chairman reported that consultations had taken place on 22 and 23 October 1991 covering the following issues: (a) the detection and control of cartels; and (b) methods of enforcing RBP laws and the sanctions applied. The delegations of France and the Republic of Korea had taken the lead in introducing topic (a) and the delegations of Germany and Sri Lanka had introduced topic (b).

76. In the exchanges that followed, various delegations had made additional comments and asked for clarification of a number of specific points. These points included: treatment of export cartel exemptions; the domestic effects of RBPs originating from abroad; the functions of the competition authority; techniques of fact-finding, including immunity for informants; appropriate penalties, including the merits of criminal and administrative systems; and suggestions for improvement of the consultations. In this respect, it had been proposed that brief materials concerning presentations be sent to the secretariat in time for processing, translating and general distribution. It had also been felt that a panel structure for the presentations could be useful for future discussions.

77. This had been followed by initial reactions and exchanges of views between various delegations on the secretariat study on concentration of market power (TD/B/RBP/80), which was highly praised by all delegations. It was understood, however, that delegations reserved their right to make additional comments in writing before the end of January 1992 to allow the secretariat to finalize the study.

Closing statements

78. The Chairman said that the tenth session of the Intergovernmental Group of Experts had concluded its deliberations with a successful outcome, and that success should undoubtedly be attributed to the spirit of cooperation, compromise and goodwill shown by all. The agreed conclusions constituted a concrete part of the foundation laid by the Second United Nations Review Conference. Much more to the point, they provided a clear guide for the secretariat in its task of preparing for the eleventh session of the Intergovernmental Group. In that connection and with regard to technical assistance, advisory and training programmes, he emphasized the call to States, in particular the developed countries and UNDP, to provide the UNCTAD secretariat with adequate financial contributions and other resources. The activities in question were the cornerstone of the effective implementation of the Set of Principles and Rules, especially by developing countries.

79. The spokesman for the Group of 77 (Philippines) said that the Intergovernmental Group's tenth session had produced fruitful results and thus followed on well from the successful outcome of the Second Review Conference. The Group of 77 was confident that the spirit of goodwill and cooperation manifested by members of the Intergovernmental Group would continue to prevail at future sessions. It welcomed the fact that Group B had shown its willingness to cooperate by submitting draft agreed conclusions and that agreement had eventually been reached on a work programme and technical assistance. The Group of 77 looked forward to further consensus being reached in the field of competition at UNCTAD VIII.

80. The spokesman for Group B (United Kingdom) said Group B welcomed the fact that it had been possible to agree on a work programme for the coming year. The Intergovernmental Group was not a forum for making great declarations or preparing resolutions. Its purpose was to allow competition experts to exchange views, discuss problems and seek the most beneficial solutions. It was a measure of the success of the tenth session that the conclusions constituted an agreed work programme for the future and no more.

81. The session had been especially successful in that nearly two days had been devoted to multilateral exchanges, and other bilateral discussions had also taken place. Group B welcomed in particular the very useful technical contributions made by the representatives of Sri Lanka, China, Kenya, the Republic of Korea and Thailand. It was most important that, in the multilateral discussions, the members of Group B should hear the views of and be exposed to the problems facing competition officials from the member States of the Group of 77, Group D and China. He hoped that the success of the tenth session would encourage more competition experts to attend subsequent sessions.

82. The constructive spirit which had enabled the Second Review Conference to be a success had been clearly apparent at the tenth session of the Intergovernmental Group. Group B welcomed this and believed that it should be built upon so that the Intergovernmental Group of Experts became an effective forum for the implementation of the Set and a stimulus to the adoption and enforcement of competition laws throughout the world.

83. The spokesman for Group D (Bulgaria) welcomed the fact that the Intergovernmental Group's tenth session had provided an opportunity to engage in intensive and useful discussions and that agreement had been reached on a work programme providing a broad mandate for the secretariat in its future work.

84. The representative of China said that, thanks to the sincere cooperation of all parties, the Intergovernmental Group had accomplished its task at its tenth session by adopting agreed conclusions on its work programme. The Intergovernmental Group had made a considerable and effective effort to improve implementation of the Set, and it would continue to play a role in future. In that connection, while discussing RBPs at the national level, the Intergovernmental Group should also pay all due attention to RBPs at the international level, especially those affecting developing countries.

85. The representative of the Union of Soviet Socialist Republics said that the Intergovernmental Group had discussed a number of important issues, and the informal consultations had made an important contribution to understanding those issues. The agreed conclusions represented a logical extension of the successful work of the Second Review Conference, and his delegation looked forward to receiving the requested studies. With regard to technical assistance, his delegation noted the universality of the approach to technical assistance in the field of RBPs, and his country was interested in such technical assistance. His delegation supported further UNCTAD activities in respect of technical assistance, advisory and training programmes in RBPs, and considered that such programmes should be extended to all interested countries.

Chapter V

ORGANIZATIONAL MATTERS

A. Opening of the session

86. The tenth session of the Intergovernmental Group of Experts on Restrictive Business Practices was opened on 21 October 1991 by Mr. E. Sahlin (Sweden), Chairman of the Intergovernmental Group of Experts at its ninth session.

B. Election of officers

(Agenda item 1)

87. At the 1st plenary meeting of its tenth session, on 21 October 1991, the Intergovernmental Group of Experts elected the following Bureau:

Chairman:	Mr. T.A. Ogada (Kenya)
Vice-Chairman:	Mr. R. Babul (Chile) Mr. E.T. Hand (United States of America) Mr. H.H. de Silva (Sri Lanka) Mr. M.J. Kisiri (United Republic of Tanzania) Mr. E. Sahlin (Sweden)
Rapporteur:	Mr. V. Bertsev (Union of Soviet Socialist Republics)

C. Adoption of the agenda and organization of work

(Agenda item 2)

88. Also at its 1st plenary meeting, the Intergovernmental Group adopted its provisional agenda (TD/B/RBP/77), as follows:

1. Election of officers

2. Adoption of the agenda and organization of work

3. Review of the operation of and experience arising from the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

4. Activities relating to specific provisions of the Set:

   (a) Studies on restrictive business practices related to the provisions of the Set of Principles and Rules;

   (b) Information and consultations on restrictive business practices;

(c) The Model Law or Laws for the control of restrictive business practices, and the Handbook on Restrictive Business Practices Legislation;

(d) Technical assistance, advisory and training programmes on restrictive business practices

5. Work programme on restrictive business practices

6. Provisional agenda for the eleventh session of the Intergovernmental Group of Experts

7. Other business

8. Adoption of the report of the Intergovernmental Group of Experts

D. Membership and attendance

89. The following States members of UNCTAD participated in the session: Algeria; Argentina; Austria; Bangladesh; Belarus; Belgium; Bulgaria; Cameroon; Canada; Chile; China; Democratic People's Republic of Korea; Dominican Republic; Egypt; El Salvador; Ethiopia; Finland; France; Gabon; Germany; Ghana; Greece; Hungary; India; Indonesia; Iran (Islamic Republic of); Italy; Japan; Kenya; Kuwait; Lebanon; Libyan Arab Jamahiriya; Madagascar; Mexico; Morocco; Namibia; Nepal; Netherlands; Nicaragua; Nigeria; Norway; Panama; Philippines; Portugal; Qatar; Republic of Korea; Romania; Saudi Arabia; Spain; Sri Lanka; Sweden; Switzerland; Thailand; Turkey; Union of Soviet Socialist Republics; United Kingdom of Great Britain and Northern Ireland; United Republic of Tanzania; United States of America; Venezuela; Zambia. The European Economic Community was also represented.

90. The following specialized and related agencies were represented at the session: International Monetary Fund; World Intellectual Property Organization; United Nations Industrial Development Organization. The General Agreement on Tariffs and Trade was also represented.

91. The following intergovernmental organizations were represented at the session: League of Arab States; Organisation for Economic Co-operation and Development; Permanent Secretariat of the General Treaty on Central American Economic Integration.

92. The following non-governmental organizations were represented at the session: General Category: Ibero-American Association of Chambers of Commerce; International Bar Association; International Chamber of Commerce; World Federation of United Nations Associations.

E. Provisional agenda for the eleventh session of the Intergovernmental Group of Experts

(Agenda item 6)

93. At its 6th (closing) plenary meeting, on 25 October 1991, the Intergovernmental Group of Experts approved the draft provisional agenda (TD/B/RBP/L.56) and authorized the Secretary-General of UNCTAD, in consultation with delegations, to adjust and complete the provisional agenda, on the understanding that any amendments or additions would be subject to consultations with the representatives of regional groups, China and interested member States within the framework of the consultative machinery established by Board decision 143 (XVI) and resolution 231 (XXII). (For the text of the draft provisional agenda, see annex II.)

F. Adoption of the report of the Intergovernmental Group of Experts

(Agenda item 8)

94. At its 6th (closing) plenary meeting, on 25 October 1991, the Intergovernmental Group of Experts adopted its draft report (TD/B/RBP/L.55 and Add.1-2) and authorized the Rapporteur to complete the report to reflect the proceedings of the closing plenary.

Annex I

AGREED CONCLUSIONS ADOPTED BY THE INTERGOVERNMENTAL GROUP OF EXPERTS AT ITS TENTH SESSION

1. the Intergovernmental Group of Experts recalls the successful conclusion of the Second United Nations Conference to Review All Aspects of the Set.

2. The Intergovernmental Group of Experts welcomes the useful work done by the UNCTAD secretariat on the study "Concentration of market power" (TD/B/RBP/80) and requests the secretariat to finalize a further draft of the study, taking into account the comments made at the tenth session of the Intergovernmental Group of Experts and written comments to be submitted by member States by the end of January 1992.

3. The Intergovernmental Group of Experts also requests the UNCTAD secretariat to prepare an annotated outline of a possible study on "Competition policy issues related to industrialization in developing countries" to be considered at the eleventh session of the Intergovernmental Group of Experts.

4. The Intergovernmental Group of Experts also welcomes the useful work done by the UNCTAD secretariat on a revised draft of possible elements for articles of a model law or laws (TD/B/RBP/81) and requests the secretariat to prepare a further draft of the paper, taking into account the comments made at the tenth session of the Intergovernmental Group of Experts and written comments to be submitted by the end of January 1992.

5. The Intergovernmental Group of Experts also requests the secretariat to continue the compilation and updating of the Handbook on Restrictive Business Practices Legislation.

6. The Intergovernmental Group of Experts considers that the secretariat's documentation on indicative checklists for information and consultations (TD/B/RBP/78) makes a positive contribution to sharing data within the limits set by national laws and established public policy and exchanging views on competition policy matters. The Intergovernmental Group of Experts also considers that the proposed indicative checklists contained in TD/B/RBP/78 could benefit from simplification in order to enhance their practical application, and requests the secretariat to revise the checklists to take into account the comments made concerning their practical application.

7. The Intergovernmental Group of Experts recognizes the importance of both multilateral and bilateral technical assistance as an important way to secure the implementation of the Set and is pleased to note the increased efforts within the framework of UNCTAD as reflected in document TD/B/RBP/83, in accordance with Sections E.8, F.6 and F.7 of the Set. The Intergovernmental Group of Experts notes, however, that although increased, the resources are still not sufficient to meet the needs for assistance, and hence calls upon States, in particular developed countries, to continue to provide technical

assistance on both a multilateral and a bilateral basis in accordance with commitments made at the Second Review Conference. It also calls upon UNDP to continue to provide appropriate resources for these activities.

8. The Intergovernmental Group of Experts requests the UNCTAD secretariat to continue to provide such assistance in order to obtain the maximum benefits within available resources. The Intergovernmental Group of Experts further requests the secretariat to take fully into account technical assistance given by Governments and other organizations in the field of competition policy.

9. The Intergovernmental Group of Experts welcomes the multilateral and bilateral consultations and the exchange of views among competition experts that have taken place during the course of the tenth session. These have provided a useful forum for consideration of particular competition issues and have served to establish additional important contacts between experts from several countries. The Intergovernmental Group of Experts therefore requests the UNCTAD secretariat to continue to facilitate these consultations.

Annex II

DRAFT PROVISIONAL AGENDA FOR THE ELEVENTH SESSION OF THE INTERGOVERNMENTAL GROUP OF EXPERTS

1. Election of officers

2. Adoption of the agenda and organization of work

3. Review of the operation of and experience arising from the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

4. Activities relating to specific provisions of the Set:

   (a) Studies on restrictive business practices related to the provisions of the Set of Principles and Rules;

   (b) Information and consultations on restrictive business practices;

   (c) The model law or laws for the control of restrictive business practices, and the Handbook on Restrictive Business Practices Legislation;

   (d) Technical assistance, advisory and training programmes on restrictive business practices

5. Work programme on restrictive business practices

6. Provisional agenda for the twelfth session of the Intergovernmental Group of Experts

7. Other business

8. Adoption of the report of the Intergovernmental Group of Experts

Annex III

CHECKLIST OF DOCUMENTS

Document No.	Title	Agenda item
TD/B/RBP/78	Information and consultation procedures on Restrictive Business Practices: Checklist for requests for information and consultations: note by the UNCTAD secretariat	4
TD/B/RBP/79 and Add.1	Replies by States and regional groupings on steps taken to meet their commitment to the Set of Principles and Rules: note by the UNCTAD secretariat	3
TD/B/RBP/80	Concentration of Market Power, through mergers, take-overs, joint ventures and other acquisitions of control, and its effects on international markets, in particular the markets of developing countries: report by the UNCTAD secretariat	4
TD/B/RBP/81	Revised draft of possible elements for articles of a model law or laws and commentaries on the elements: prepared by the UNCTAD secretariat	4
TD/B/RBP/82	Handbook on Restrictive Business Practices Legislation: note by the UNCTAD secretariat	4
TD/B/RBP/83	Activities relating to specific provisions of the Set: technical assistance, advisory and training programmes on restrictive business practices: note by the UNCTAD secretariat	4
TD/B/RBP/84	Information and consultations on restrictive business practices: communication received from the OECD	4

Document No.	Title	Agenda item
TD/B/RBP/L.54	Draft agreed conclusions submitted by the representative of the United Kingdom of Great Britain and Northern Ireland on behalf of the States members of Group B	3, 4, 5
TD/B/RBP/L.55 and Add.1-2	Draft report of the Intergovernmental Group of Experts on Restrictive Business Practices on its tenth session	8
TD/B/RBP/L.56	Provisional agenda for the eleventh session of the Intergovernmental Group of Experts: submitted by the UNCTAD secretariat	6
TD/B/RBP/L.57	Draft agreed conclusions submitted by the Chairman	3, 4, 5
TD/B/RBP/Misc.12 and Add.1	Provisional list of participants	
TD/B/RBP/INF.28	List of participants	

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